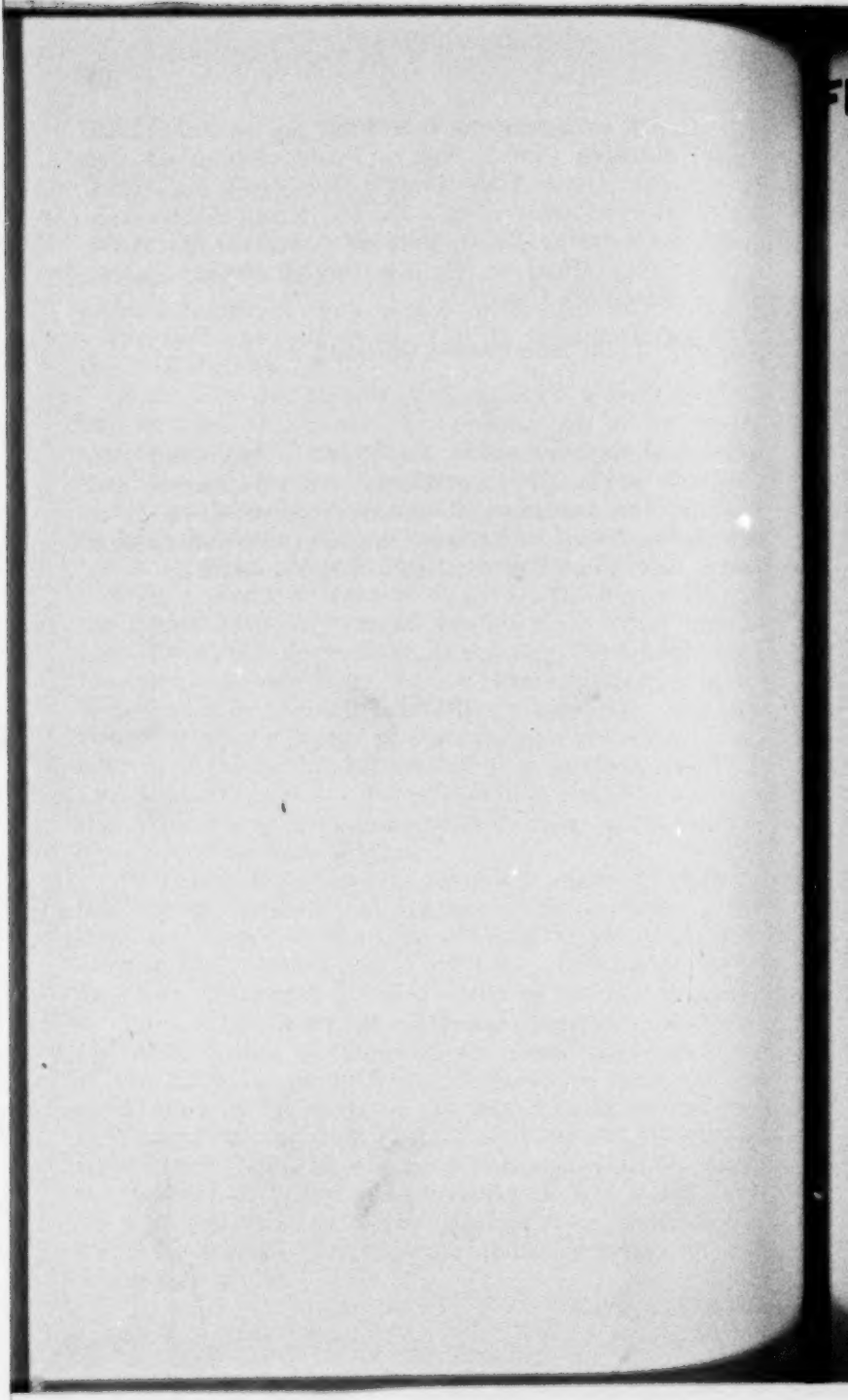

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1929

No. 232

THE HOME INSURANCE COMPANY AND FRANKLIN FIRE INSURANCE COMPANY,

Appellants,

against

C. J. DICK, TEXAS AND GULF STEAMSHIP COMPANY, AND SUDERMAN AND YOUNG, INC.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF TEXAS.

STATEMENT AS TO JURISDICTION ON APPEAL.

DAVID RUMSEY,
MARK W. MACLAY,
Counsel for Appellants.

The Evening Post Job Printing Office, Inc., 134 Fulton St., New York, N. Y.

Supreme Court of the United States

OCTOBER TERM, 1929

No. 232

THE HOME INSURANCE COMPANY and FRANKLIN FIRE INSURANCE COMPANY,

Appellants,

AGAINST

C. J. DICK, TEXAS AND GULF STEAMSHIP COMPANY, and SUDERMAN AND YOUNG, INC.

Statement as to Jurisdiction on Appeal

MAY IT PLEASE THE COURT:

The appellants in support of the jurisdiction of this court to review the above entitled cause on appeal respectfully represent:

A

STATUTORY PROVISIONS SUSTAINING JURISDICTION

The Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937 (United States Code, Title 28, Section 344), provides that Section 237(a) of the Judicial Code is amended to read in part as follows:

"Sec. 237(a) A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the

validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such state court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

The Act of January 31, 1928, Chapter 14, 45 Stat. 54 (United States Code, Title 28, Section 861), provides as follows:

"* * * That the writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal.

"Sec. 2. That in all cases where an appeal may be taken as of right it shall be taken by serving upon the adverse party or his attorney of record, and by filing in the office of the clerk with whom the order appealed from is entered, a written notice to the effect that the appellant appeals from the judgment or order or from a specified part thereof. No petition of appeal or allowance of an appeal shall be required: *Provided, however,* That the review of judgments of State courts of last resort shall be petitioned for and allowed in the same form as now provided by law for writs of error to such courts."

The Act of April 26, 1928, Chapter 440, 45 Stat. 466 (United States Code, Title 28, Section 861 (b)) provides that Section 2 of the Act of January 31, 1928, be amended to read as follows:

"Sec. 2. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relat-

ing to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

The foregoing statutes are believed to sustain the jurisdiction of this court to review on appeal the final judgment herein of the Supreme Court of the State of Texas, the highest court of the state in which a decision in this suit could be had, where was drawn in question, on the ground of its being repugnant to the Constitution of the United States, and where the decision was in favor of, the validity of Article 5545 of the Revised Civil Statutes of Texas of 1925, which is set forth on page 6 of this Statement.

B

Date of Judgment and Date of Application for Appeal

The judgment sought to be reviewed was entered on the 10th day of April, 1929. (R. 225)*

A motion for rehearing was filed in the Supreme Court of the State of Texas on the 24th day of April, 1929. (R. 234-237) An order of that court denying the motion for rehearing was entered on the 12th day of June, 1929. (R. 238)

The application for appeal was presented to the Chief Justice of the Supreme Court of the State of Texas and allowed on June 14, 1929. (R. 238-247)

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*All references to the record are to the pages of the certified unprinted record prepared by the Clerk of the Supreme Court of the State of Texas and on file with the Clerk of this Court. The record has not yet been printed.

C

NATURE OF CASE AND RULING BELOW

On March 18, 1921, in Mexico, C. J. Dick procured a policy of insurance from the Compania General Anglo-Mexicana de Seguros, S. A., hereinafter called the Mexican Insurance Company, insuring the tugboat *R. Waverly* against loss by fire and other casualties in the amount of $35,000. On March 29, 1921, the Mexican Insurance Company entered into reinsurance agreements in Mexico with The Home Insurance Company and Franklin Fire Insurance Company, hereinafter called the American Reinsurance Companies, in the sum of $15,000 respectively.

The policy of insurance contained the following provision:

> "It is understood and agreed that no judicial suit or demand shall be entered before any tribunal for the collection of any claim under this policy, unless such suits or demands are filed within one year counted as from the date on which such damage occurs." Exhibit 2, (R. 101)

The vessel was alleged to have been destroyed by fire at Tampico, Mexico, on or about July 27, 1921. (R. 6, 41, 43)

On October 27, 1923, more than two years after the alleged fire, the insured, C. J. Dick, filed suit in the District Court of Galveston County, Texas, against the Mexican Insurance Company to recover a total loss under the Mexican policy. (R. 5-7)

The Mexican Insurance Company was a corporation incorporated under the laws of Mexico, had no agent in Texas, and was served by publication. The plaintiff, Dick, sued out ancillary writs of garnishment against the American Reinsurance Companies, each of which was a corporation organized and existing under the laws of the State of New York. The affidavit for garnishment was in

the Texas statutory form. Texas & Gulf Steamship Company and Suderman & Young, Inc. were allowed to intervene. The American Reinsurance Companies, as garnishees, answered, denying any indebtedness to the Mexican Insurance Company. The plaintiff, Dick, filed controverting affidavits alleging that each of the American Reinsurance Companies was indebted to the Mexican Insurance Company in the sum of $15,000 on the ground that shortly after the issuance of the policy by the Mexican Insurance Company it had reinsured its obligation assumed thereby with each of the American Reinsurance Companies to the extent of $15,000, and that hence each of the American Reinsurance Companies was indebted to the Mexican Insurance Company in that amount.

The American Reinsurance Companies answered, denying that they were indebted to the Mexican Insurance Company, and pleaded in bar of plaintiff's suit that the policy sued upon provided as follows:

> "It is understood and agreed that no judicial suit or demand shall be entered before any tribunal for the collection of any claim under this policy, unless such suits or demands are filed within one year counted as from the date on which such damage occurs." Exhibit 2, (R. 101)

The American Reinsurance Companies, as garnishees, further alleged that the said insurance policy was executed, was performable and was intended to be performed in Mexico, and was valid under certain provisions of the Commercial Code of the Republic of Mexico; that the clause above quoted was a valid defense to any suit brought to recover on said policy after the expiration of one year from the date on which the alleged damage occurred; and that this suit was not filed within one year. (R. 45-48)

To these answers of the garnishees, the plaintiff filed a general demurrer on the ground, among others, that Article 5545 of the Revised Civil Statutes of Texas of 1925 was a

valid statute of the State of Texas which prohibited entering into a contract containing a limitation of less than two years of the time within which suit might be brought. (R. 48-49) The text of the statute referred to in this demurrer is as follows:

> "Art. 5545. No person, firm, corporation, association or combination of whatsoever kind shall enter into any stipulation, contract, or agreement, by reason whereof the time in which to sue thereon is limited to a shorter period than two years. And no stipulation, contract, or agreement for any such shorter limitation in which to sue shall ever be valid in this State."

The District Court of Galveston County sustained the demurrer upon the ground that Article 5545 of the Revised Civil Statutes of Texas of 1925 was a valid statute, not in conflict with either Section 10 of Article I of the Constitution of the United States, or Article XIV of the Amendments of the Constitution of the United States. (R. 49-51, 186) Judgment was accordingly rendered by the said District Court of Galveston County in favor of the plaintiff for $17,587.50 and in favor of the intervenors for $19,087.50 against the Mexican Insurance Company; and in the garnishment proceeding, the main cause and the said garnishment proceeding having been tried together as one case, judgment was rendered in favor of the plaintiff and the intervenors against The Home Insurance Company for $18,337.50 and against Franklin Fire Insurance Company for the same amount. (R. 49-51)

The American Reinsurance Companies duly appealed from these judgments to the Court of Civil Appeals of Texas for the First Supreme Judicial District of Galveston and again drew in question the validity of said statute. That court affirmed the judgments of the court below and rendered its opinion in favor of the validity of this statute as against the claim of the American Reinsurance Companies that it was repugnant to Section 10 of Article I of the Con-

stitution of the United States and Article XIV of the Amendments of the Constitution of the United States. (R. 178-193) A motion by the American Reinsurance Companies for a rehearing was denied.

The American Reinsurance Companies then duly appealed to the Supreme Court of Texas and again drew in question the validity of the statute. That court affirmed the judgments of the District Court of Galveston County and of the Court of Civil Appeals, above referred to; held that Article 5545 of the Revised Civil Statutes of Texas of 1925 was not in violation of Section 10 of Article I of the Constitution of the United States or of Article XIV of the Amendments of the Constitution of the United States; and sustained its validity. (R. 226-233)

The American Reinsurance Companies' motion for rehearing in the Supreme Court of Texas was denied.

The American Reinsurance Companies' application for an appeal to this court was allowed by the Chief Justice of the Supreme Court of Texas on June 14, 1929. (R. 238-247)

The Supreme Court of Texas is the highest court of the State of Texas in which a decision in this suit can be had; and therein and in the Court of Civil Appeals and in the District Court these appellants drew in question the validity of the statute of the State of Texas, to wit; Article 5545 of the Revised Civil Statutes of Texas of 1925, on the ground of its being repugnant to the Constitution of the United States; and the decision of said courts was in favor of its validity.

D

Cases Believed to Sustain Jurisdiction

The following decisions of this court are believed to sustain jurisdiction of this appeal:

Kans. City So. Ry. v. *Road Imp. Dist. No. 6*, 1921, 256 U. S. 659-660;

Dahnke-Walker Co. v. *Bondurant*, 1921, 257 U. S. 282, 287-290.
Aetna Life Ins. Co. v. *Dunken*, 1924, 266 U. S. 389, 393, 400;
Fiske v. *Kansas*, 1927, 274 U. S. 380, 385;
Millsaps College v. *City of Jackson*, 1927, 275 U. S. 129, 132;
Saltonstall et al. v. *Saltonstall et al., Trustees*, 1928, 276 U. S. 260, 267-268.

We respectfully submit that this court has jurisdiction of this appeal by virtue of Section 237(a) of the Judicial Code as amended by the Act of February 13, 1925, and of the Act of January 31, 1928, as amended by the Act of April 26, 1928.

New York, August 6, 1929.

Respectfully submitted,

DAVID RUMSEY,
MARK W. MACLAY,
Counsel for Appellants.

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SEP 12 1929
CHARLES ELMORE CRO
CL

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1929

No. 282

THE HOME INSURANCE COMPANY and FRANKLIN FIRE INSURANCE COMPANY, Petitioners

against

C. J. DICK, TEXAS AND GULF STEAMSHIP COMPANY, and SUDERMAN AND YOUNG, INC.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

DAVID RUMSEY
MARK W. MACLAY
Counsel for Petitioners